IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 778

In the Matter of

SAMUEL WINSHIP,

Appellant.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Opinion Below

The majority and dissenting opinions of the New York Court of Appeals are reported at 24 N.Y.2d 196, 203, 247 N.E.2d 253 and appear in the printed Appendix (hereafter cited as "A. ——") at pages 38-49. No other opinions have been rendered.

Jurisdiction

The order of the Court of Appeals of the State of New York was entered on March 6, 1969. [A. 37] Notice of appeal was filed March 27, 1969 [A. 50], and probable jurisdiction was noted by the Court on October 27, 1969. [A. 52] The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1257(2).

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV

New York Family Court Act

§744. Evidence in fact-finding hearings; required quantum

(a) Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing.

(b) Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient.

Question Presented

DID THE FINDING OF GUILT AGAINST APPELLANT, A TWELVE-YEAR-OLD BOY FACING A SIX-YEAR CONFINEMENT FOR A LAW VIOLATION, DENY HIM DUE PROCESS AND EQUAL PROTECTION IN THAT HIS GUILT WAS PROVED, IN ACCORDANCE WITH THE STATE STATUTE, BY ONLY A MERE PREPONDERANCE OF THE EVIDENCE?

Statement of the Case

A petition charging appellant with juvenile delinquency for an alleged act of larceny was filed in the New York Family Court on March 30, 1967.[1] The petition alleged that:

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[1] A juvenile delinquent is defined by section 712 of the New York Family Court Act (hereafter referred to as FAM. CT. ACT) as "a person over seven and less than sixteen years of age who does any act, which, if done by an adult, would constitute a crime."

> On March 28, 1967, at about 6:15 p.m. [the appellant] at 2436 Grand Concourse, Bronx, . . . did wilfully and unlawfully enter the locker room of the Normandie Furniture Store . . . and did remove from the petitioner's pocketbook $112.00 . . . which he did steal and carry away. [A. 1-2]

Appellant, aged twelve, was tried at a fact-finding hearing before Judge Millard Midonick of the Family Court on March 30, 1967.[2] He was represented by the law guardian [A. 4], an attorney provided by the New York Legal Aid Society for the representation of indigent juveniles. FAM. CT. ACT, Art. 2.

The Evidence

Rae Goldman, the petitioner, a saleslady at the Normandie Furniture Store, testified that on March 28, 1967, she was at work and began her dinner break sometime before 5:30 p.m. [A. 5, 9, 10] At 5:30 p.m., upon finishing dinner which she had eaten in the store, she placed her pocketbook in one of the store's four small unlocked lockers. [A. 8, 10] She explained that the lockers are behind a door in the rear of the premises and that adjoining the lockers is a second unmarked door which opens to a lavatory for the use of store employees. [A. 7, 8]

She then resumed her duties, although no customers were present. She observed that "6 o'clock happens to be a very quiet time. It is dinner hour." [A. 7] In fact, she testified, apart from herself and two co-workers she thought there was nobody else in the premises. [A. 7, 8]

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[2] A fact-finding hearing in a delinquency proceeding is defined by the New York statute as "a hearing to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." FAM. CT. ACT, §742.

Mrs. Goldman explained that access to the store is possible only through the front entrance and that during her dinner break the entrance was visible to her at all times. [A. 8, 10] Moreover, the door behind which the lockers and lavatory are situated was in her "plain sight" from the time she placed her bag there after dinner. [A. 8] To the judge's inquiry whether she recalled any customers entering the store and walking to the rear between 5:30 and 6:15 p.m., she replied: "No. When a customer walks into the store we, as a rule, follow the customer because we try to give the customer attention." [A. 9]

At 6:15 p.m., Mrs. Goldman became aware that the lavatory door was locked. A minute or two later it opened and a boy ran out. [A. 5, 8] She saw him as he ran through the front door and into the street. [A. 7] Mrs. Goldman had no more than ten seconds to observe him as he fled. She saw his profile from a distance of twenty feet [A. 10] and claimed that the doorway through which he ran was well lit. [A. 7]

Immediately thereafter, Mrs. Goldman ran to the locker and observed that her pocketbook was not there. She then ran out to the street in pursuit of the boy. Having failed to apprehend him, she returned to the store and proceeded to the lavatory adjoining the lockers where she saw her pocketbook lying on the floor with the contents scattered. [A. 5, 6, 7] Approximately $112.00 in currency was missing. [A. 6, 7]

Mrs. Goldman telephoned the police and gave them a description of the boy by apparent age, size, skin color, and clothing. [A. 20] The following evening she was

called to the precinct where only the appellant was shown to her. [A. 6]

Mrs. Goldman further testified that she was familiar with appellant because she had seen him in the store on several previous occasions; that she had once permitted him to shine her shoes and had on other occasions chased him from the store. [A. 6, 7, 20, 21] She said that appellant was the boy who ran from the premises on the 28th of March. [A. 5, 6]

Ethel Winship, appellant's mother, testified that on the morning of March 28th she took him to the zoo and that subsequent to their return, the boy did not leave their home after 5 p.m. She testified that she was home with him and other members of the family all evening. [A. 10-11] The layout of the apartment would have precluded the boy's leaving without her seeing him. [A. 12] She was certain that her son had no money on him in the past few days other than the small change which she gave to him. [A. 12-13]

Melvin Coleman, appellant's uncle, having some doubt as to the dates of the preceding week that he had been at appellant's home, ultimately stated that on the 28th of March he was at the boy's house and that some time in the afternoon Samuel came in from play. They had dinner at about 6 p.m. and Samuel was in Mr. Coleman's sight until about 7 p.m. [A. 14-16, 25-26]

Mr. Coleman further stated that he occasionally gave appellant pocket money and that he had done so on the afternoon of the 29th; that apart from that change and small amounts obtained by shoe shining, the boy showed no signs of having large sums in the past few days. [A. 16-17]

Samuel Winship, the appellant, testified that March 28th was a school holiday and he went to the zoo in the morning with his sister and mother. Afterwards he rode bicycles with his sister. [A. 17-18] In the late afternoon his mother called him to supper. He did not leave the apartment after dinner but watched television and went to bed at about quarter to eight. [A. 18] He testified further, that he had never shined Mrs. Goldman's shoes, that he had never seen her before the night of March 29th in the police station and that he had never been inside the Normandie Furniture Store. [A. 18-19]

While on the stand, appellant said he had no money with him, and at the request of the judge, he emptied his pockets. He had only a comb and brush. [A. 19]

Patrolman Clarke testified that he arrested Samuel the night following the larceny in connection with an unrelated matter at a premises located about three and one-half blocks from the Normandie Furniture Store. When he brought the boy to the precinct, Clarke first learned of the complaint phoned in by Mrs. Goldman the previous night. She was called to the station house to identify the boy. [A. 22-24]

Clarke stated that when he arrested Samuel, the boy did not have any paper currency in his possession. He did have two rolls of dimes (not the property of Mrs. Goldman) and a shoeshine kit. [A. 23-24] Finally, Clarke estimated that the distance between the boy's home and the Normandie Furniture Store is about a fifteen minute bus ride. [A. 22]

The Finding

After both sides rested, the law guardian moved to dismiss the petition on the grounds that the allegations had not been proved by a preponderance of the evidence. [A. 25] The judge denied the motion and "found [the allegations] to be proved by a preponderance of the evidence." [A. 27] The law guardian then moved to dismiss the petition on the grounds that the allegations had not been proved beyond a reasonable doubt and the following colloquy occurred: [A. 27-28]

> Counsel: [T]his finding . . . violated the boy's equal protection rights because if he was 16, he would have to be found guilty beyond a reasonable doubt. Your Honor is making a finding by a preponderance of the evidence.
>
> Court: Well, it convinces me.
>
> Counsel: It's not beyond a reasonable doubt, your Honor.
>
> Court: That is true. . . . Our statute says a preponderance and a preponderance it is. [A. 28] . . . [A]nybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt basis and my finding isn't that certain. . . . [The finding] is not [as] certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis [sic] as an adult finding because it's not made on the same basis. . . . [A. 29]

A finding of fact was thereupon entered that appellant had committed an act which if done by an adult would constitute the crime of larceny. [A. 34]

On April 13, 1967, the petition in this case was, for purposes of record simplification, discharged to the docket of a subsequent petition. [A. 35][3] On that subsequent docket appellant was placed in the New York State Training School [A. 35] for an initial period of eighteen months, subject to extension in the discretion of the Family Court, until appellant's eighteenth birthday. [FAM. CT. ACT, §756] Placement was in fact extended by the court for one year on October 13, 1968, and expired on October 13, 1969.

The Appeal

The Appellate Division of the New York Supreme Court, First Department, affirmed the order of the Family Court without opinion on June 6, 1968. [A. 36]

The New York Court of Appeals affirmed, by a vote of four to three, in an opinion written by Judge Bergan. [A. 37] Allowing that the reasonable doubt standard may be an ingredient of due process in adult criminal trials, the majority based its holding on the denomination of juvenile proceedings as "civil." Accordingly, they found the lower standard of proof is constitutionally permissible.

Chief Judge FULD, in a dissenting opinion [A. 46] in which he was joined by Judges KEATING and BURKE, deter-

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[3] An order of discharge, in the practice of the New York Family Court, is a finding of guilt with placement (or other disposition) to be made under another pending case. Placement here was thus made pursuant to Docket D-798-67 on April 13, 1967. The extension of placement for one year was also made on that docket. In other words, the procedure followed here amounts to a consolidation of cases for the purposes of sentencing. When the judge determines an appropriate disposition for the child, for example whether he should be confined or placed on probation [see FAM. CT. ACT, §753], each and every finding of guilt which has been made against the juvenile is considered. An order of discharge is, thus, a final order from which an appeal to the Appellate Division of the New York Supreme Court may be taken as of right. [*Matter of Chauncey Reidout*, 26 A.D.2d 780 (1st Dept., 1966)]

mined that the logic of *In Re Gault*, 387 U.S. 1 (1967) requires the conclusion that the requirements of due process are not met in juvenile proceedings if a child may be found to be guilty of a law violation and incarcerated as a result, on evidence less than proof beyond a reasonable doubt.

Summary of Argument

The juvenile court judge in this case acknowledged that he had a reasonable doubt about the youngster's guilt when he determined that the boy had committed an act of larceny. Applying the standard prescribed by the New York statute, the judge expressly recognized that since culpability had been proved only by a mere preponderance of the evidence, the finding of guilt lacked certainty. Yet on the strength of that uncertain finding, the twelve-year-old juvenile faced incarceration until his eighteenth birthday.

While comparatively low standards of proof may satisfy due process where interests less critical than liberty are in issue, the very highest standard has always been employed where freedom is at stake. That highest standard, expressed as "proof beyond a reasonable doubt," is a natural corollary of the presumption of innocence. As a rule which serves to insure that no person will suffer for an act he did not commit, it is fundamental to the fairness of proceedings at which innocence is challenged. This Court has, accordingly, found that rules which serve to protect the innocent from unjust punishment acquire a due process dimension. Moreover, the unswerving adherence to the reasonable doubt standard through the history of Anglo-American law constitutes it the "law of the land" for adults who are accused of crime. In this sense

too, the standard is implicit in the concept of due process of law. *In Re Gault* accorded these "instruments of due process" to adjudications of juvenile misconduct in order to "enhance the possibility that truth will emerge" [387 U.S. 1, 19-21 (1967)] and to protect innocent children, like innocent adults, against the possibility of an erroneous conviction.

In rejecting the reasonable doubt standard for juveniles, the majority of the New York Court of Appeals refused to acknowledge the seriousness of a delinquency adjudication. It relied upon the labeling of juvenile proceedings as "civil" —a label discredited by *Gault* as a means of withholding fundamental rights from juveniles.

The decision of the court below is no firmer on its practical side. The New York Court erroneously believed that use of the high standard would deprive needy and deserving youngsters of the unique services dispensed by the Family Court. Apart from this somewhat rose-tinted view of the Family Court's offering, the fact is that the flexibility of the New York juvenile court at the pre and post fact-finding stages—the stages at which the special services of the court are operative—is in no way affected or restricted by the standard of proof by which guilt or innocence is determined. Moreover, the court's jurisdiction over juveniles in trouble who are not law violators, also serves to insure the service of the court to those who need it.

The adult-juvenile distinction, accordingly, which is drawn for purposes of flexibility at stages other than the fact-finding hearing, is unrelated to the standard of proof which governs the determination of guilt or innocence. Failure to employ the high standard for that determina-

tion is thus an unwarranted discrimination against youngsters accused of law violations and serves to deny them equal protection of the law.

ARGUMENT

POINT I

Section 744 of the New York Family Court Act, Insofar as It Permits a Finding of Guilt in a Delinquency Proceeding to Be Based Upon a Preponderance of the Evidence, Violates Due Process of Law.

When a juvenile is accused of a law violation and faces incarceration, he is entitled to every protection flowing from the presumption of innocence. The Constitution assures him of no less. This Court, in laying the cornerstone of juvenile rights, employed the force of the Due Process Clause and its basic command that a finding of guilt be preeminently reliable. *In Re Gault*, 387 U.S. 1 (1967). While *Gault* dealt specifically with rights not here in issue, the theme of that decision is unmistakable: The special interests of children may not be read to obscure the concomitant right of young offenders to be judged in a process which accords with basic notions of fairness and the protection of the innocent.

Gault determined that an excess of informality at the adjudicative stage, customary in juvenile courts, had led to grave injustices to youngsters accused of law violations. The Court documented the penal repercussions of an adjudication. It concluded therefore, that the traditional labeling of delinquency proceedings as "civil" had served only to obscure the seriousness of an adjudication and to strip the fact-finding process of the procedural regularity

appropriate to it where a loss of liberty might occur. Giving full credit to the rehabilitative goals of juvenile justice, *Gault* stressed that:

> "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" [387 U.S. at 50]

The Court deemed a delinquency proceeding based on a law violation to be "comparable in seriousness to a felony prosecution" [347 U.S. at 36]. To view delinquency proceedings otherwise, *Gault* said:

> "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." [Id. at 50]

This Court then went on to hold that at the fact-finding stage, due process requires that delinquency proceedings observe certain time honored procedures which guard against unfairness in determining guilt or innocence. Stressing the due process mandate for a high degree of certainty where the juvenile court, despite its good intentions, may deprive a youngster of liberty, this Court wrote:

> "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from

the confrontation of opposing versions and conflicting data." [387 U.S. at 19-21]

While this Court did not determine the standard of proof for juveniles in *Gault*, and has never squarely held which standard is constitutionally required for adult proceedings, it is apparent that of all the procedures which avoid "unfairness to individuals and inadequate or inaccurate findings of fact" perhaps the most fundamental is the requirement that culpability be proved by the highest standard of proof. That highest standard, expressed in our law as "proof beyond a reasonable doubt," is clearly designed to protect an innocent person from an unjust verdict of guilt.

The standard is indeed a natural corollary to the presumption of innocence—a presumption which is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U.S. 432, 453 (1895). The reasonable doubt standard, in turn, reflects the quality or strength of the evidence necessary to overcome that most fundamental presumption. WIGMORE, EVIDENCE, §2511 (3d ed. 1940). The right to an acquittal on a reasonable doubt and the presumption of innocence are, in fact, commonly expressed in the same statutory provision.[4]

The due process stature of the standard, elevated to that status by its role in reducing the risk of an unjust conviction, was recognized by this Court in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). There, Justice BRENNAN wrote:

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[4] Section 389 of the NEW YORK CODE OF CRIMINAL PROCEDURE, for example, provides that:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to acquittal."

> "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder . . . of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt."

That a rule bears the imprint of due process where its main function is to protect the innocent, has also been recognized by this Court in a recent line of decisions dealing with the retroactivity of constitutional cases.[5] In these cases, rules which safeguard the innocent were clearly distinguished from those which, by contrast, serve essentially to curb official excesses. Due process considerations arise the Court concluded, where procedures are an "adjunct to the ascertainment of truth" [*Tehan* v. *Shott*, 382 U.S. at 416] and which "affect . . . the very integrity of the fact-finding process and avert . . . the clear danger of convicting the innocent." *Johnson* v. *New Jersey*, 384 U.S. at 728.

The preponderance standard, in contrast to the reasonable doubt test, entails a much higher risk of an unjust finding of guilt. The difference between the standards could not better be illustrated than by what occurred in this juvenile's trial. The verdict of guilt against him was based entirely upon the identification made by the com-

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[5] *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967).

plainant. Yet the complainant conceded that she had but ten seconds to observe the true culprit in profile, from a distance of twenty feet, as he darted from the store. Appellant, arrested the next day, was confronted by the complainant in a "showup" in the police station. The complainant then identified him in court as the thief and as a boy she knew previously—an identification which might well have been the result of the inherently suggestive showup. See *Stovall* v. *Denno,* 388 U.S. 293 (1967).

Even crediting the complainant's identification of appellant as the boy who ran from the premises, her testimony did not establish that he was the thief. She did not see him either take or run with the proceeds. Nor was the money in appellant's possession when he was arrested the following day.

In these circumstances, the juvenile court judge in applying the statutory standard, was most forthright when he acknowledged that guilt had been established only by a mere preponderance of the evidence. Noting that he had not used a reasonable doubt test, the judge acknowledged, moreover, that his finding lacked certainty. Thus he observed:

> "[A]nybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt and my finding isn't that certain." [A. 29]

He recognized further, that the finding was not on as "solid a basis" as a verdict in an adult proceeding because of the differences in the standards of proof. [A. 29]

The suggestion by the majority of the New York Court of Appeals in this case that there is but a "tenuous difference" between the preponderance standard and proof beyond a reasonable doubt [A. 45] is thus refuted by the judge's ruling and by the facts of this case. As the dissent recognized [A. 49] the Family Court judge perceived a real and substantial difference between the standards.

Indeed, the real rather than merely semantic differences between the tests of "preponderance," "clear and convincing evidence" and "proof beyond a reasonable doubt" are reflected throughout the law. Fairly recently, this Court reiterated the substantive distinctions when it rejected the preponderance standard in deportation proceedings and required the Government to adduce "clear, unequivocal and convincing evidence." *Woodby* v. *Immigration Service,* 385 U.S. 276, 285 (1966). Justice STEWART wrote:

> "[T]o be sure, a deportation proceeding is not a criminal prosecution. [citation omitted] But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case."

The preponderance test has thus been reserved for "the general run of issues in civil cases" [MCCORMICK, EVIDENCE, §319, p. 676 (1954)]—that is, commonly, where the interests are essentially proprietary and may justifiably be affected by a mere showing of probabilities. Where the interests are more significant, for example where such issues as the legitimacy of a child, adultery, lost wills, and oral contracts to make bequests are involved, something more than a mere preponderance is required. *Woodby* v. *Immigration Service, supra,* at p. 285 and n. 18; MCCORMICK, EVIDENCE, *supra,* §§319, 320.

Where, however, freedom and good name are at stake, as they are here, history teaches that the highest certainty of proof has traditionally been required. Although the phrasing "beyond a reasonable doubt" is fairly modern, the requirement of the very highest standard of proof in criminal cases has its roots in the jurisprudence of pre-Conquest England.[6] The standard stems from the days when jurors were punished for rendering a verdict of guilt against an innocent man. IX HOLDSWORTH, HISTORY OF THE ENGLISH LAW, p. 225 (1926).[7]

The great commentators also endorsed the principle that it is better to free the guilty than to punish the innocent. IV BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, pp. 358-9, 10th ed. (1787).[8] In fact, COKE justifies the denial of counsel to a defendant in a criminal case on the grounds that the proof of guilt should be so irrefutable that counsel is unnecessary. COKE, THIRD INSTITUTES (6th ed., 1680), pp. 29, 137.

While the severity of punishment may have originally inspired the requirement of the highest measure of proof, the standard persisted as punishments became more lenient. Indeed, so deeply ingrained is this concept today in New York, that proof beyond a reasonable doubt is required for such petty infractions as violation of a zoning ordinance. *People* v. *Kollender,* 169 Misc. 995, 10 N.Y.S. 2d 252 (Nassau Cty. Ct. 1939). The standard is applied in a traffic

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[6] MCCORMICK, *supra,* §321, n. 2. The writer dates the "reasonable doubt" formulation from the year 1798.

[7] King Alfred is reputed to have hanged 44 judges in one year for having rendered "incorrect" verdicts in capital cases. GREENLEAF, EVIDENCE, §29, n. 4 (16th ed. 1890).

[8] See also, II Hale, PLEAS OF THE CROWN, p. 289 (1800); HOLDSWORTH, *supra,* at p. 224.

case [*People* v. *Martindale*, 6 Misc. 2d 85, 162 N.Y.S. 2d 806 (Montgom'y City Ct. 1957)] although the defendant does not have a right to assigned counsel. *People* v. *Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670, cert. denied, 384 U.S. 911 (1966).

The standard, moreover, has been adopted in criminal proceedings throughout this Country, IX WIGMORE, EVIDENCE, §2497 (3d ed. 1940, Supp. 1964). It is clearly a "settled standard of the criminal law." *Holland* v. *United States*, 348 U.S. 121, 138 (1954). And while the universality of a rule may not be conclusive regarding its due process stature, it does "reflect a profound judgment about the way in which law should be enforced and justice administered." See *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968).

The universal American application of the reasonable doubt standard in the prosecution of adults, reveals it as "the law of the land," the historical analogue of due process of law. In *Leland* v. *Oregon*, 343 U.S. 790 (1952) the Court held that to require a defendant to prove his insanity beyond a reasonable doubt did not reduce the Government's burden of proving all elements of the crime by the same standard. In dissent, Justice FRANKFURTER wrote:

> "It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" [343 U.S. at 802-3]

The argument presently propounded has found favor in a number of jurisdictions which, since *Gault*, have adopted

the reasonable doubt standard in their juvenile procedures. In various ways, they have thereby acknowledged that due process standards of fairness demand the highest assurance that no person, regardless of age, will suffer loss of liberty on less than the most certain proof of misconduct.

Two jurisdictions, Illinois and the United States Court of Appeals for the Fourth Circuit, have adopted the high standard for juveniles by judicial decision. *In Re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 716 (1967); *United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir. 1968). The *Costanzo* court, which deemed the reasonable doubt standard a constitutional necessity in proceedings under the Federal Juvenile Delinquency Act, declared that:

> "No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. . . . The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt.' . . . In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection. . . . " [395 F. 2d at 444]

A third jurisdiction, North Dakota, has adopted the reasonable doubt test by statute.[9] In New Jersey, Colorado, Maryland and Washington, the same has been accomplished by court rule.[10] An eighth state, Virginia, required the reasonable doubt criterion for juveniles some twenty years

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[9] GEN. STAT. OF N.D. ch. 27-20, §29(2) (1969).

[10] N.J. RULES, 6:9(1)f; COLO. REV. STAT. ch. 22, Art. 3, §6(1) (1967); MD. CODE ANN. Art. 26, §70-18(a) (1969); WASH. SUP. CT., Juv. Ct. Rules, §4.4(6) (1969).

before *Gault*.[11] *Jones* v. *Commonwealth*, 185 Va. 335, 38 S.E. 2d 444 (1946).

In a ninth jurisdiction, Nebraska, a majority of four of that state's highest court view the reasonable doubt standard to be constitutionally required by virtue of *Gault*. *DeBacker* v. *Brainard*, 183 Neb. 461, 161 N.W. 2d 508, appeal dism. 38 U.S.L.W. 4001 (Nov. 12, 1969). The preponderance standard still prevails in Nebraska, however, due to a state constitutional provision requiring a five-judge majority to declare a state statute unconstitutional. And in a tenth state, Ohio, the highest court has rejected the preponderance test in favor of a standard of "clear and convincing" evidence. *In Re Agler*, 19 Ohio St. 2d 70, 249 N.E. 2d 808 (1969).

Those jurisdictions which have, since *Gault*, held fast to the preponderance test have generally relied upon the now discredited " 'civil' label of convenience" to justify it.[12] No

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[11] In the years before *Gault*, most state juvenile court acts specified no standard of proof for delinquency proceedings. See, for example, IOWA CODE, ch. 232, §232-27 (1965); MINN. STAT. ANN. ch. 260, §260.155-1 (1969); UTAH CODE, Tit. 55, ch. 10, §100 (1965).

The preponderance standard was adopted by statute in California in 1961 [CAL. WELFARE AND INSTITUTIONS CODE §701]; by New York in 1962 [NEW YORK FAMILY COURT ACT, §744]; and by Illinois in 1963 [ILL. REV. STAT. 1965, pars. 701-706] although the latter was declared unconstitutional in 1967. *In Re Urbasek*, *supra*.

[12] In addition to New York, four jurisdictions which have passed upon the issue since *Gault* have retained the preponderance standard. They are Oregon [*State* v. *Arenas*, 453 P.2d 915 (1969)], California [*In Re Dennis M.*, 75 Cal. R. 1, 450 P.2d 296 (1969)], the District of Columbia, [*Matter of Ellis*, 253 A.2d 789 (App. D.C. 1969)] and Texas [*State* v. *Santana*, 444 S.W.2d 614 (1969) (Tex. Sup. Ct.)].

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[A. 42]

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adjudication subjects a child to a loss of liberty until the twentieth birthday for a girl and the eighteenth birthday for a boy, irrespective of the law violation alleged. FAM. CT. ACT, §754; §756. In many instances this may be for a much longer duration than a criminal sentence for the same act.

If the juvenile is between the ages of fifteen and sixteen and has committed a class A or B felony as defined by the New York Penal Law, that confinement may be in a penal institution under the auspices of the New York Department of Correction, rather than in a Training School run by the Department of Social Services.[13] Moreover, section 427(b) of the New York Social Services Law authorizes the transfer of any juvenile over the age of sixteen who is placed in the Training School, to a state correctional facility. The decision to transfer the juvenile is made without a hearing and is within the broad discretion of the commissioners of the departments of Correction, Social Service, and Mental Hygiene.

In addition to the loss of liberty, an adjudication, as *Gault* and the President's Crime Commission report documented so exhaustively, pursues a child for a lifetime.[14] Schools in New York are customarily privy to court records and the Armed Services generally require, as a condition of enlistment, that the applicant consent to a review of his juvenile record.

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[13] See FAMILY COURT ACT, §758(b) and NEW YORK CORRECTION LAW, §§270, 291.

[14] See *Gault*, 387 U.S. at 24; The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (hereafter referred to as *Task Force*), Lemert, *The Juvenile Court—Quest and Realities*, p. 103.

A delinquency finding may preclude subsequent civil service employment as in *Strong* v. *Kennedy*, 29 Misc. 2d 54, 210 N.Y.S. 2d 588 (Sup. Ct., N.Y. C'y 1961) where the petitioner had been automatically rejected for a job as a New York City policeman because of an adjudication fifteen years earlier, at the age of thirteen. And should an individual violate the law after the age of sixteen, his juvenile court record may be considered by the criminal courts in imposing sentence upon him. FAM. CT. ACT, §783.

It is clear, then, that the criminal-delinquency parallel drawn by *Gault* is fully apposite to New York. Acknowledging these realities, the dissent [A. 46] more accurately discerned *Gault's* intent. Chief Judge FULD determined that in light of *Gault*, a low standard of proof may not be justified on the theory that juvenile proceedings are designed, in the words of the majority, "not to punish, but to save the child." The Chief Judge concluded that where the proceedings may and did result in such substantial incarceration, culpability must be established by proof beyond a reasonable doubt.

The Chief Judge observed, moreover, that in addition to its role in augmenting the fairness of the verdict, the reasonable doubt standard is closely related to the privilege against self-incrimination. The high standard of proof, he noted, serves as a device to offset the adverse effects of an accused person's decision not to testify in his own behalf. *Gault* secured the privilege against self-incrimination to juveniles. Yet that right is severely diluted where the standard of proof is so low that a finding of guilt is virtually assured, should the juvenile elect to remain silent after only a *prima facie* case has been adduced.

Finally, the trend of authoritative commentary on the juvenile courts also favors the reasonable doubt standard. The standard has been adopted by the Children's Bureau of the Department of Health, Education, & Welfare[15] and by the National Conference of Commissioners on Uniform State Laws.[16] It has also been endorsed by the American Bar Association which, in its publication on the juvenile courts, emphasized the need for accuracy at the fact-finding stage. Its authors observed that:

> "[T]he reasonable doubt test is superior to all others in protecting against an unjust adjudication of guilt, and that is as much a concern of the juvenile court as it is of the criminal court. It is difficult to see how the distinctive objectives of the juvenile court give rise to legitimate institutional interest in finding a juvenile to have committed a violation of law on less evidence than if he were an adult." DORSEN and REZNEK, *In Re Gault and the Future of Juvenile Law*, ABA *Family Law Quarterly*, Vol. 1, No. 4, 25-27 (Dec. 1967).[17]

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[15] HEW, *Legislative Guide for Drafting Family and Juvenile Court Acts*, Children's Bureau publication no. 472, §32(c), p. 33, 1969.

[16] *Uniform Juvenile Court Act*, §29(b).

[17] The preponderance standard has been rejected in favor of the "clear and convincing" evidence standard by the President's Crime Commission [see *Task Force Report;* Lemert, *The Juvenile Court—Quest and Realities*, p. 103] and by the National Council on Crime and Delinquency. See *Model Rules for Juvenile Courts*, Rule 26, p. 57 (1969).

POINT II

The Accused Juvenile Is Denied Equal Protection of the Law When Facts Are Found By a Standard Less Rigorous Than in an Adult Trial. The Youth of the Accused Does Not Justify a Different Standard for Determining Guilt or Innocence, However It May Justify the Unique Features of the Juvenile Court at Stages Other Than the Fact-Finding Hearing.

Although *Gault* expressly premised the constitutional rights of juveniles upon the Due Process Clause of the Fourteenth Amendment, implicitly this Court invoked the child's right to Equal Protection of the law as well. By comparing a delinquency proceeding to a felony prosecution [387 U.S. at 36, 49-50] this Court placed accused juveniles in the same category as accused adults—as distinguished from other classes of persons facing serious disabilities such as deporation and civil, mental or narcotics commitment. Indeed, those jurisdictions which have adopted the reasonable doubt standard by judicial decree, have relied as much upon the Equal Protection Clause as upon Due Process. *In Re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 716 (1967); *United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir. 1968) The inescapable corollary to the single classification of juvenile and adult offenders is that to withhold a critical safeguard from some members of the class solely because of their youth is to deny them equal protection of the law. Cf. *Baxstrom* v. *Herold,* 383 U.S. 107 (1966).

Notwithstanding the single classification for adult and juvenile offenders, there are, of course, procedural differences in the way in which adult and juvenile cases are

processed. These differences, however, are wholly unrelated to the standard of proof for determining guilt or innocence. For example, in juvenile proceedings it remains desirable to retain a degree of flexibility in determining, at the pre-judicial stage, which cases should be brought before the court. Likewise, it is desirable to give the court leeway at the post-adjudicative stage—when it determines the course of treatment or rehabilitation.

But in New York, both the pre-judicial or "intake" phase and the post adjudicative or "dispositional" phase are completely separate from the hearing at which guilt or innocence of the law violation is determined—that is, from the "fact-finding" hearing. The standard of proof at the fact-finding stage thus has no effect whatever upon the unique features of the juvenile court, that is, upon the flexibility of intake services and the flexibility of the dispositional hearing.

The intake phase in New York consists of an informal conference between the juvenile, his parent, the complainant, and an "intake" probation officer. The intake officer may, and in many cases does, determine that the matter need not be brought before a judge at all. He may "adjust" the case. An "adjustment at intake" may require the juvenile to cooperate with a community agency or to report for awhile to the intake officer. If all goes well, the youngster will never be brought to court on the alleged law violation and the matter will be forgotten. FAM. CT. ACT, §734; R. 7.3.

If, on the other hand, the intake officer determines that the case should be brought to court, the statute provides that the judge at the fact-finding hearing shall have no information regarding the intake conference. FAM. CT. ACT,

§735. The desired flexibility of the pre-judicial or intake phase is thus in no way related to, let alone restricted by the standard of proof at any subsequent judicial fact-finding hearing.

The fact-finding hearing and the standard of proof which governs it are likewise insulated from the dispositional hearing. The New York proceeding, as *Gault* noted, is a bifurcated one. It is only after guilt has been established at the fact-finding stage, that a separate dispositional hearing is held. Fam. Ct. Act, §§742-746; §749. The statute, moreover, prohibits the judge when hearing a law violation, from having any information concerning the child's social or court history which may have been prepared by probation officers. Fam. Ct. Act, §756.

It is at the dispositional hearing that the unique features of the juvenile court once again come into play. At this hearing, whether there shall be confinement and if so, what type of confinement is determined. In this determination, the court is not bound by the fixed statutory commands of a penal law; rather, the welfare of the child guides the judge. Other forms of treatment short of confinement are considered as well.

For example, the child may be placed on probation or on suspended judgment. He may be sent to live with a relative, or required to cooperate with a community agency. It may even be determined that although the child is guilty of the law violation, no treatment or confinement is necessary and he may be discharged or dismissed with or without a warning from the judge. Fam. Ct. Act, §753; §§755-758; R. 7.5; R. 7.6.

At this dispositional phase, the juvenile court is appropriately informal and the procedures relaxed. The evi-

dence, unlike at the fact-finding hearing, need not be competent—only material and relevant. Compare FAM. CT. ACT, §744(a) with §745(a). The need for confinement or treatment need only be established, appropriately enough, by a preponderance of the evidence. FAM. CT. ACT, §745(b).

The fact-finding hearing, thus insulated, should appropriately resemble the procedural regularity of an adult trial. To withhold from the juvenile a critical safeguard, such as a high standard of proof, at the stage at which guilt or innocence is determined cannot be justified by the need for flexibility at the pre and post-adjudicative stages. Since the adult-juvenile distinction, relevant for purposes of such flexibility, has no relationship to the standard of proof, the disparity of standards for adults and juveniles is an unwarranted discrimination and serves to deny the latter equal protection of the law. Cf. *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

It has been suggested by the appellee that since one of the alternatives open to the judge at disposition is to dismiss or discharge the juvenile because a need for rehabilitation has not been demonstrated, the standard of proof at the fact-finding hearing is of less significance than it is at an adult trial. Such a contention rests upon the notion that a child only bears the stigma of "delinquent" if the judge determines that active treatment is indicated, whereas an adult is branded a "criminal" as soon as he is convicted.

The contention is wholly specious since a disposition of discharge or dismissal does not serve to erase the finding that the juvenile is guilty of the law violation. Realistically, such a disposition is precisely like a suspended sentence in a criminal case. The finding of guilt remains upon the record.

The discrimination against a juvenile in denying him the higher standard is underscored by the fact that youths just over the age of sixteen who are subject to criminal court jurisdiction in New York, but who are approved for "Youthful Offender" treatment, are entitled to the reasonable doubt standard of the New York Code of Criminal Procedure. The similarities between juvenile delinquency and youthful offender proceedings are striking. For example, the objective of both is to rehabilitate youngsters without subjecting them to the full consequences of a criminal conviction. Thus, both result in an "adjudication" rather than a "conviction" and the maximum penalty for both is an indeterminate confinement.[18] Since the higher standard of proof has never been considered inimical to the purposes of youthful offender proceedings, there is no cause to believe that it would undermine the goals of juvenile proceedings.

Despite the irrelevance of the standard of proof to the rehabilitative purposes of the Family Court, the New York Court of Appeals in this case observed that the event which brought the child to court and which is the subject of the fact-finding hearing may only play a small role in "the totality of factors which cause a child to meet difficulty in his life." [A. 40] In other words, the majority suggested that even if the child were innocent of the particular law violation, he might still require the services of the Family Court.

This concern that a child, though innocent of a law violation, might be engaging in a general course of conduct inimical to his welfare which calls for judicial inter-

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[18] Compare the NEW YORK FAMILY COURT ACT, §§756, 758, 781-784 with NEW YORK CODE OF CRIMINAL PROCEDURE, §913-f, j, k, n, q.

vention is met, however, by other provisions of the New York statute. Section 713 of the Family Court Act gives the Family Court jurisdiction over "Persons In Need of Supervision." Such a person is defined as:

> "A male less than sixteen years of age and a female less than eighteen years of age who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." FAM. CT. ACT, §712(b).

In other words, to require a dismissal or acquittal of a law violation because guilt has not been proved beyond a reasonable doubt, does not prevent the court from rendering service to youngsters who need it. Where an interested person has knowledge of the youngster's wayward behavior he may file a Person In Need of Supervision petition. FAM. CT. ACT, §733.

In sum, the durable and universal standard of proof regarded as the minimum upon which an adult may suffer loss of liberty, is no less appropriate for juveniles. Its rejection by the New York Court in juvenile proceedings rests upon the inaccurate assumption that a high standard of proof will interfere with the help which juvenile courts may uniquely be able to render to children. Incarceration of a juvenile, New York has said, does not require the care or certainty that is required for the incarceration of an adult. Even assuming the popular premise that incarceration of a youngster for rehabilitation is a benevolence, it is well to heed the wisdom of Justice BRANDEIS who observed that:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead* v. *United States,* 227 U.S. 438, 479 (1929, dissenting opinion)

Conclusion

WHEREFORE, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

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